

Internal Review Request (received 02 July 2025) - Reference: DFI/2025-0290

This is a formal request under Regulation 11 of the Environmental Information Regulations 2004 for an internal review of the Department for Infrastructure's response dated 2 July 2025 (Ref: DFI/2025-0290) concerning the legal basis for accepting Dalradian Gold Ltd's 2019 amendments to planning application LA10/2017/1249/F without requiring a new application.

Legal Framing - Limits of Discretion and Material Change

This request raises a fundamental legal issue that must be addressed as part of the review:

Does the Department accept that its discretion to accept amendments to a live planning application is legally constrained where those changes materially alter the character, substance, or environmental impact of the proposed development?

In my view, the 2019 amendments introduced by Dalradian Gold Ltd - including the removal of cyanide, relocation of key infrastructure, reconfiguration of mine waste processing, additional off-site traffic impacts, and a change in final product - cumulatively exceeded the legal threshold for material change. They constituted a substantive transformation of the application, such that any discretion the Department may have held was extinguished by the requirements of:

Murphy v DoE (NI),

Inverclyde District Council v Lord Advocate [1981],

BT v Gloucester City Council [2001],

The EIA Regulations 2017,

The Habitats Regulations 1995 (as amended), and

The duty to re-consult under Development Management Practice Note 14.

Grounds for Review - Procedural and Legal Breaches

1. False Denial of Legal Advice Held

The Department stated in its response of 2 July 2025 that it "does not hold" any internal or external legal advice. However, I am now in possession of a formal internal legal opinion dated 15 October 2019. This document:

Interprets the scope of the 2019 amendments.

Cites the above case law and Practice Note 14.

Concludes that a new application was not required, subject to consultation.

This document was plainly held and relied upon. The failure to acknowledge or disclose it constitutes a breach of:

EIR Regulation 5(1) - failure to disclose information held.

EIR Regulation 14(3)(a) - providing a misleading reason for refusal.

2. Failure to Apply Proper Exemption

The Department failed to cite Regulation 12(5)(b) (legal professional privilege) as the basis for any non-disclosure. The use of Regulation 13 (personal data) was procedurally inappropriate, and no public interest test was offered. This omission renders the refusal invalid.

It is immaterial whether the Department now chooses to characterise the 15 October 2019 document as formal legal advice or internal legal reasoning. What matters is that it contains legal interpretation of planning law, case law, and statutory discretion thresholds - and was relied upon to determine whether a new application was required. This makes it “environmental information” under Regulation 2(1) of the EIR. It should have been disclosed or lawfully exempted under Regulation 12(5)(b), which the Department failed to do. The failure to disclose it when directly requested, and to deny its existence in the 2 July 2025 response, constitutes a breach of both Regulation 5(1) and Regulation 14(3).

If the Department does not consider this document to constitute “legal advice”, then its withholding under the pretext of personal data exemption is both factually and legally indefensible.

3. Failure to Disclose Material Information During Statutory Consultation

The legal opinion in question materially informed the Department’s acceptance of the 2019 amendments. It was not disclosed during:

The 2019 consultation on the amended ES and planning documents,

Any subsequent re-publication, or

Any public communication regarding screening for EIA/HRA purposes.

This violates:

Article 6(4) of the EIA Directive,

Article 7 of the Aarhus Convention,

The Department’s own consultation duties under the Planning Act (NI) 2011, and

The public’s right to procedural fairness under Article 6 of the ECHR.

By withholding this legal justification at the time, it was being relied upon to direct policy, the Department rendered the consultation procedurally defective and misled the public as to the legal reasoning behind the project's ongoing treatment.

4. Misuse of Discretion as a Shield Against Legal Duty

The internal legal opinion accepts that departmental discretion is constrained by case law and the need to avoid prejudice. However, the scale and nature of the 2019 amendments were such that:

They introduced significant new environmental effects.

They modified the function, design, and impacts of the mine.

They required new EIA and HRA screening, which did not occur.

They altered the application so substantially that any prior screening or statutory consultation was invalidated.

Accordingly, the Department's continued reliance on the 2019 legal opinion - without resubmission, re-screening, or re-consultation - represents an abuse of discretion and an unlawful failure to restart the process.

Procedural Ambush - Improper Future Reliance on Withheld Opinion

I must also place on record that any attempt by the Department to now rely on the 2019 legal opinion to support decisions during a resumed Planning Appeals Commission inquiry would represent a procedural ambush and a breach of both transparency and procedural fairness.

I therefore request formal assurance that:

The Department will not seek to rely on this legal opinion unless it is fully disclosed and subject to public scrutiny.

No action will be taken to restart the PAC inquiry until the Department reassesses, through a lawful and public process, whether a new planning application is now required.

All legal and planning documents related to the 2019 amendments will be disclosed or lawfully exempted using the correct regulatory framework.

Outcome Requested

Please confirm that:

1. The 15 October 2019 legal opinion will be disclosed in full or lawfully exempted under Regulation 12(5)(b).

2. All records used to assess whether the 2019 amendments required a new application will be identified and disclosed.
3. The Department accepts that its discretion does not override the EIA and HRA obligations to re-screen and re-consult where significant or cumulative effects are introduced.

Should the Department fail to provide a legally adequate review, I reserve the right to refer the matter to the Information Commissioner's Office and seek judicial review or interim injunctive relief should the inquiry be restarted on a procedurally defective basis.

Response (issued 06 August 2025)

You wrote to me on 02 July 2025 requesting an internal review of the handling of your Environmental Information Regulations 2004 (EIR) request for information. Your request, regarding legal advice relied upon by the Department for Infrastructure in determining that Dalradian Gold Ltd.'s 2019 amendments to planning application LA10/2017/1249/F did not constitute a fundamentally different application, was received in the Department as part of a wider complaint on 03 June 2025. You had received a response to your request on 02 July 2025, from Judith Andrews, interim DfI Deputy Secretary, under the reference DFI/2025-0290.

As Departmental Information Manager, my role in carrying out an 'Internal Review' following a complaint or 'appeal', is pursuant to the Secretary of State for Constitutional Affairs' Code of Practice [which now comes under the responsibility of the Secretary of State for the Department of Justice] on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000 and, by extension, the Environmental Information Regulations. Section 39 of the Code of Practice requires "a fair and thorough review of the handling issues and of decisions taken pursuant to the [Freedom of Information] Act, including decisions taken about where the public interest lies in respect of exempt information." Under the Environmental Information Regulations, this review of the handling of your request for information is a "reconsideration", a public authority obligation contained within Regulation 11 (Representations and Reconsideration). I have no role or locus with regards to any issues arising out of the substance of any information sought or the resolution of complaints, which may be the subject matter of the information.

I have examined the information relating to your request and completed my review. I can now inform you that, having reviewed the handling of your request, the Department did fulfil

its obligation under the Environmental Information Regulations 2004. I would like to take this opportunity to explain my decision, addressing in order each of the headings in your email requesting internal review.

As in previous internal review requests, you have raised a number of issues in your request for this internal review. I will address each of these in the order you have raised them. I will, however, reiterate that, as laid out in the explanation about my role in Annex A, any FOI or EIR internal review does not extend to any underlying disputes that a requester may have with the public authority, or any other person.

Legal framing - Limit of discretion and material change.

You state, in the first few sentences of your internal review request, prior to your numbered issues, that the Department's original response provided *"raises a fundamental legal issue that must be addressed as part of the review"*. In this you are clearly referring to legal matters relating to planning applications. Such considerations play no role in my review of the handling of your information request. I cannot seek to address any challenges to, or questions or complaints about, the Department's role in making determinations about planning applications, as any such issues raised in your correspondence are outside of the scope of EIR.

If you feel that there is a need to challenge the Department's compliance with planning legislation, there are other, more appropriate, avenues available to you to make such a challenge. These other avenues may provide you, or your legal representatives, with privileged access to information that may not be suitable for public disclosure.

1. False denial of legal advice held

You allege that the Department falsely claimed that there was no legal advice held. You further state that you are *"now in possession of a formal internal legal opinion dated 15 October 2019"*.

It would appear that the *"formal internal legal opinion"* to which you refer is the file note and update from 2019 that was issued by the Department along with its response to that part of your original request that sought *"written clarification of the legal reasoning and statutory tests applied in determining that a new application was not required"*.

However, while the 2019 file note does refer to case law, it is not, in fact, a form of legal advice. It is a document prepared by DfI Planning's professional and technical staff, summing up their professional opinion summing up their understanding of the position in relation to that planning application at that time.

As you were informed, in the Department's response, DfI's position is that the:

Department may have made decisions informed by 'legal advice', but this advice is already available in the form of case reports from the various courts. These case reports are generally publicly available and can be located using various online search engines.

When responding to an EIR request, the Department defines 'legal advice' as privileged communication provided to a client by their legal representative and is protected under the Common Law system by the convention known as Legal Professional Privilege.

Both legal advice itself and any discussions of this advice will, for as long as that advice remains "live", normally be withheld from disclosure under Reg. 12(5)(b) of EIR. If the Department held any legal advice in respect of an ongoing planning application, it would be extremely likely to be withheld if requested under EIR. Indeed, it would also be likely to be withheld, even once the individual planning application had been fully processed, if the legal advice would continue to be relied upon for similar circumstances in other planning applications.

The file note, redacted to remove third party personal information, that was provided to you was an example of Planning staff employing their own expert knowledge, including an awareness of leading case law at the time, to help the Department to come to a decision about whether a new planning application was required or not. There is reference made to leading cases, but these references do not constitute 'legal advice' provided to the Department, nor a *"formal internal legal opinion"*. What the file note did was specify the existing planning framework within which the Department could make its decision about the planning application.

I have been in contact with relevant DfI Planning staff, they have confirmed that the information disclosed to you is all the information that the Department holds that could, conceivably fall within the scope of the request received on 03 June 2025 and that DfI does not hold the *"internal or external legal advice supporting the Department's position"* that you had requested.

I am satisfied that the Department does not hold records of legal advice, either having been sought or discussed, as part of its official records. There was no "false denial", because there is no official record held by the Department of "legal advice" in this case.

2. Failure to apply proper exemption

You complain that some of the information contained within the file note and update that was disclosed was redacted under the EIR exception provided under Reg. 12(3) & 13, in your view this was *"procedurally inappropriate"*, and you claim that *"no public interest test*

was offered” for the information that was redacted. You also state that DfI “failed to cite” the Reg. 12(5)(b) for information that was withheld, and that this

“failure to disclose... when directly requested, and to deny its existence in the 2 July 2025 response, constitutes a breach of both Regulation 5(1) and Regulation 14(3)”.

While I would agree with you, in your view that questions about the disclosure of legal advice would be subject to consideration under Reg. 12(5)(b) of EIR, the Department’s position is that it did not hold legal advice, or discussions about legal advice, as outlined above, so there was no need to consider that exception. It is not a breach of EIR to deny the existence of information that is not held, and which does not exist within the Department’s official records.

The information that was provided was redacted to withhold certain third-party personal information. Contrary to your assertion that this information was redacted without a test being carried out into the public interest in disclosure, the Department’s response clearly outlined the public interest arguments favouring redaction when including the following text:

Following consideration of the public interest in this case, I attach all information held that is suitable for disclosure to the public. However, I have determined that some of the requested information is not suitable for release and the attached records have been redacted for the following reason.

The redacted information constitutes third party personal data within the meaning of the Data Protection Act 2018 (DPA). A public authority may only release third party personal data if to do so would be fair, lawful and would meet the conditions in Schedule 2, 3 or 4 of the DPA. The Department may not disclose personal information to the public in contravention of any of the data protection principles (Article 5(1) UK General Data Protection Regulation or sections 34(1) and 85(1) DPA) and must consider all consequences of disclosure in each case.

The information provided has therefore been redacted under the exception provided under EIR by Regulation 12(3) & 13: personal information. I am satisfied that the public interest is best served by withholding this information.

As advised, above, the Department did not withhold “legal advice”, because none was held. The Department disclosed the redacted file note and its update, because the information contained within it did not constitute “legal advice”, but rather the expert

assessment of Dfl Planning staff of the context within which proposed planning application amendments should be considered.

The information that was redacted was clearly third-party personal information and I am entirely satisfied that the redacted information should have been withheld in order for the Department to comply with data protection legislation. It is clearly not in the public interest for public authorities to deliberately create data breaches by making public personal data.

3. Failure to disclose material information during statutory consultation

This is not a matter for an internal review of the handling of your request for information under the Environmental Information Regulations. If you are dissatisfied with the way in which the Department has engaged in the 2019 statutory consultation process, there are other avenues available to you by which you may seek to register your concerns or otherwise challenge the Department's decisions.

4. Misuse of discretion as a shield against legal duty

This issue is not something that can be addressed by an internal review into the handling of a request for information. You again assert that the file note and update, that was provided to you, is in some way an *"internal legal opinion"*. As mentioned above, this is not the case. However, notwithstanding this, the issues that you raise are part of an ongoing dispute, where you object to the decision to not require a new planning application, rather than any issues arising from the handling of your request.

Procedural ambush- Improper future reliance on withheld opinion

You set out three demands, based again on your belief that what was included in the file note and update constituted some form of "legal advice", that Dfl not rely upon it unless made available to the public, it would carry out a reassessment of the possible need for a new planning application before the PAC inquiry is restarted and that *"all legal and planning documents"* relating to the 2019 planning application amendments either *"be disclosed or lawfully exempted"*.

Only the last of those three demands relates in any way to this internal review. The Department has already made available the information that you have requested, subject to some redaction of personal data under the Reg. 12(3) & 13 exception.

Outcome requested

You asked that the Department confirm the following three points that you raised:

1. *The 15 October 2019 legal opinion will be disclosed in full or lawfully exempted under Regulation 12(5)(b).*

The Department's position is that the 2019 file note and update, to which you apparently refer, is not a legal, but rather a planning opinion. As it does not fall within the scope of the Common Law definition of Legal Professional Privilege, it would not be appropriate for the Department to seek to apply the Reg. 12(5)(b) exception under EIR. In any event the file note and update, other than third-party personal data, was already disclosed with the original response to your request.

2. *All records used to assess whether the 2019 amendments required a new application will be identified and disclosed.*

All relevant records for planning applications, suitable for routine disclosure, are made available to the public via the NI Planning Portal. The Department has made available the file note and update that constitutes the record of the assessment undertaken in relation to the possibility that the amendments to the original planning application were sufficiently significant to require the applicant to submit a wholly new planning application.

3. *The Department accepts that its discretion does not override the EIA and HRA obligations to re-screen and re-consult where significant or cumulative effects are introduced.*

This is not a matter for an internal review of the handling of your request for information. You are seeking a commitment in relation to planning matters, this is an entirely separate matter from the correct application, or otherwise, of EIR requirements when processing information requests. I cannot comment on this matter.

I hope you find this helpful.